INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	6
Conclusion	15

CITATIONS

Cases:

Bain, Ex parte, 121 U.S. 1	10
Barnes v. *United States*, 412 U.S. 837	6
Black v. *United States*, 385 U.S. 26	12–13
Blumenthal v. *United States*, 332 U.S. 539	7
Byrd v. *United States*, 314 F. 2d 336, certiorari denied, 375 U.S. 816	14
Caldwell v. *United States*, 205 F. 2d 879	13
Caldwell v. *United States*, 218 F. 2d 370, certiorari denied, 349 U.S. 930	13
Corpus v. *Beto*, 469 F. 2d 953	14
Kotteakos v. *United States*, 328 U.S. 750	8, 9
O'Brien v. *United States*, 386 U.S. 345	13
Overstreet v. *United States*, 321 F. 2d 459, certiorari denied, 376 U.S. 919	10
Salinger v. *United States*, 272 U.S. 542	9, 10
Thomas v. *United States*, 398 F. 2d 531	10
Tinker v. *United States*, 417 F. 2d 542, certiorari denied, 396 U.S. 864	14
United States v. *Agueci*, 310 F. 2d 817	8
United States v. *Colasurdo*, 453 F. 2d 585	10
United States v. *Franzese*, 392 F. 2d 954, vacated on other grounds, 394 U.S. 310	14

559-708—74——1

Cases—Continued

	Page
United States v. *Greer*, 467 F. 2d 1064, certiorari denied, 410 U.S. 929	7
United States v. *Griffin*, 463 F. 2d 177, certiorari denied, 409 U.S. 988	10
United States v. *Jackson*, 482 F. 2d 1167, certiorari denied, 414 U.S. 1159	7
United States v. *Lambert*, 463 F. 2d 552	14
United States v. *Rispo*, 460 F. 2d 965	12
United States v. *Rosner*, 485 F. 2d 1213	12
United States v. *Soriano*, 482 F. 2d 469	5
Vincent v. *United States*, 337 F. 2d 891, certiorari denied, 380 U.S. 988	10

Statutes and rule:

18 U.S.C. 371	3
21 U.S.C. 841	3
21 U.S.C. 846	3
Rule 7(c), Fed. R. Crim. P	9

Miscellaneous:

3 Wigmore, *Evidence*, §§ 1002–1003 (3d ed., 1940)	14

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1574

EDUARDO ARROYO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6610

EPIFANIO ROSA PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6913

RAPHAEL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 494 F. 2d 1316.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1974. Petitions for writs of certiorari were filed by Arroyo and Perez on April 22, 1974. The petition for a writ of certiorari by Gonzalez (No. 73-6913) was filed on June 18, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Perez (No. 73-6610):

1. Whether the evidence was sufficient to sustain the conviction of petitioner Perez for conspiring to import heroin.

2. Whether the district judge erred in refusing to instruct the jury regarding multiple conspiracies.

Gonzalez (No. 73-6913):

3. Whether the indictment was defective in failing to contain the words, 'true bill,'' and whether it was unlawfully amended by the court before being presented to the jury.

Arroyo (No. 73-1574):

4. Whether the presence of a government informant at meetings between Arroyo and his counsel requires reversal of Arroyo's conviction absent any evidence of prejudice resulting therefrom.

5. Whether the district judge erred in refusing to allow defense counsel to call a witness to impeach a government witness on a collateral matter.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to import, possess and distribute heroin and to assist a federal prisoner's attempt to escape, in violation of 21 U.S.C. 846 and 18 U.S.C. 371 (Count 1), and possession of 64 kilograms of heroin with intent to distribute, in violation of 21 U.S.C. 841 (Count 2).[1] Arroyo was sentenced to imprisonment for consecutive terms of fifteen and ten years; Gonzalez was sentenced to imprisonment for consecutive terms of fifteen and five years; and Perez was sentenced to concurrent three-year terms of imprisonment. In addition, three-year special parole terms were imposed upon petitioners. The court of appeals affirmed (Arroyo Pet. App.; Perez Pet. App.; Gonzalez Pet. App. D).

1. In September 1970, Alfredo Mazza, an Argentinian, entered the United States as the agent for a group of European heroin smugglers. Mazza was introduced to Alfredo Aviles, who agreed to assist in the importation scheme. In July 1971, these individuals arranged to smuggle 72 kilograms of heroin into the United States concealed in a Volvo automobile transported aboard the SS *France*. The car was owned by a Belgian police official, co-conspirator Joseph Vienne

[1] The jury found specially that each of the petitioners was involved in conspiring to import heroin, and that Arroyo and Gonzalez had also conspired to distribute heroin. Only a co-defendant, Ferrer, was found to have conspired to assist in the escape of a federal prisoner.

(Tr. 905–906).[2] Upon its arrival in New York City, the Volvo was driven by Mazza and three Frenchmen to a temporary location, and then to a garage rented by Aviles for disassembling (Tr. 661–662, 884).

Petitioner Perez, an associate of Aviles, aided Mazza and the Europeans first by providing explicit directions to Aviles' garage from the place where the Volvo had been temporarily stored, and then by chauffeuring Mazza around the city to familiarize him with the route to the garage (Tr. 878–882). When the Volvo had reached the garage, Perez remained in attendance while it was disassembled and the cache of heroin extracted. Perez and Mazza counted the 144 half-kilogram bags of heroin removed from the car (Tr. 903–905). Of this amount, 64 kilograms were made available to Aviles for further distribution.

From the garage, the bags of heroin were carried to Aviles' apartment. There, petitioners Arroyo and Gonzalez met with Aviles. Gonzalez tested a portion of the heroin, and carried away a small amount for further sampling (Tr. 665). Later, Arroyo and another individual took 49 kilograms of heroin. Over the next several days, Arroyo and Gonzalez made six or seven payments of $100,000–$150,000 at Aviles' apartment.[3] After receiving the money, Mazza and one of the Frenchmen, co-defendant Joannes Munoz, pack-

[2] We are lodging with the clerk of this Court the four-volume transcript of trial and sentencing proceedings ("T.").

[3] On one occasion Gonzalez delivered shopping bags full of money in small denominations, and was rebuked by Mazza because of the difficulty of transferring small bills. (Tr. 666–667, 909–910).

aged it in bundles and dispatched it to a European bank (Tr. 909–913).

2. In January 1972, the conspirators attempted to ship 176 kilograms of heroin to New York. However, the heroin was intercepted in Miami by federal narcotics agents, and Arroyo, Mazza, Aviles and others were arrested.[4] Aviles was released on bail, but Mazza was unable to satisfy his bail of one million dollars. While still incarcerated, Aviles agreed with Mazza to assist the latter in gaining his release, either by raising the necessary funds through another large heroin shipment, or, should this prove unsuccessful, by aiding Mazza to escape from prison and flee to Argentina (Tr. 667–670). Upon his release on bail in April 1972, Aviles returned to New York City and made contact with individuals in Argentina and France, and with Mazza's attorney, co-defendant Julio Ferrer, in an attempt to aid Mazza (Tr. 670–672).

Before proceeding further, however, Aviles chose to cooperate with the government. Thereafter, his conduct was guided largely by a New York City Task Force undercover officer, William Valentine. During the spring and summer of 1972, Valentine gained the confidence of other conspirators and recorded numer-

[4] The Miami defendants filed a motion to suppress the heroin, which was granted. On appeal, a panel of the Fifth Circuit reversed in part and affirmed in part. *United States* v. *Soriano*, 482 F. 2d 469. The government's petition for rehearing *en banc* of the portion of the panel's opinion sustaining the lower court was granted, and on July 15, 1974, the full court reversed the panel and refused to suppress any of the heroin, 497 F. 2d 147.

ous conversations, on the telephone or in person, between Valentine or Aviles on the one hand and Ferrer or the European and South American conspirators. After meeting with Valentine personally in Buenos Aires, the Argentinian members of the smuggling ring approved the shipment to New York of 60 kilograms of heroin. In June 1972, petitioner Arroyo told Aviles that he would participate in the sale of the pending shipment (Tr. 678–680, Govt. Exh. 10). In August 1972, petitioner Gonzalez confirmed his and Arroyo's continuing interest in the heroin, which had not yet arrived (Govt. Exh. 16). In October, the 60 kilogram shipment left Argentina by ship, secreted in bales of sheep skins consigned to a New York furrier. The narcotics were seized by Brazilian officials.

ARGUMENT

1. Petitioner Perez alleges that the evidence was insufficient to support his conviction under Count 1. The jury found specifically (*supra,* n. 1) that he had participated only in the conspiracy to import, not the conspiracy to distribute, but Perez asserts that his role began after the importation had been completed. We first note that Perez received equal concurrent sentences on the two counts upon which he was convicted; accordingly, the Court need not consider this claim, which is addressed only to the conspiracy count. *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16. In any event, Perez' claim is without merit.

His argument is based upon too narrow a view of the concept of importation. When Perez committed an overt act in furtherance of the conspiracy (direct-

ing Mazza to the garage rented by Aviles), the Volvo was already in this country, where it had been stored briefly pending its movement to a secure place for dismantling and removal of the heroin cache. The jury could have concluded from the evidence that his agreement to participate in the conspiracy had preceded that conduct. In any event, the "importation" of the heroin was not completed at that time since the heroin had not reached its final destination where it would be separated from the vehicle. Thus, Perez was properly found to be a part of the importation scheme when he guided the contraband-laden Volvo to a garage where the smugglers removed the heroin and turned it over to Aviles for local distribution. See *United States* v. *Jackson,* 482 F. 2d 1167, 1178 (C.A. 10), certiorari denied, 414 U.S. 1159.

The evidence of Perez' knowledge of importation is ample. The vehicle being dismantled was a foreign make, bearing Belgian license plates. It was accompanied by an Argentinian and three Frenchmen, who were in charge of stripping the Volvo to remove the heroin from hidden compartments. From this evidence the jury could properly infer that, whether or not Perez was familiar with other details of the plan, he was sufficiently associated with it to have been a knowing participant in the conspiracy to import the heroin. See *Blumenthal* v. *United States,* 332 U.S. 539, 556–557; *United States* v. *Greer,* 467 F. 2d 1064 (C.A. 7), certiorari denied, 410 U.S. 929.

2. Acknowledging that the proof as to some of the participants (*e.g.,* Mazza, Aviles) may well have

shown a single conspiracy with multiple aims (Perez Pet. 16–17), Perez contends that since the evidence as to him showed only participation in one phase of the scheme,[5] he was entitled to an instruction on the issue of multiple conspiracies under *Kotteakos* v. *United States*, 328 U.S. 750, 767–777. This contention misconstrues *Kotteakos*, where the government admittedly proved eight separate conspiracies, related to each other only because one defendant among the 32 accused was involved in all of them. Here there was no question of separate conspiracies; the evidence proved the existence of a single conspiracy with different culprits performing distinct duties at various stages thereof. As stated in *United States* v. *Agueci*, 310 F. 2d 817, 827 (C.A. 2):

> Merely because the Government in this case did not show that each defendant knew each and every conspirator and each and every step taken by them did not place the complaining appellants outside the scope of the single conspiracy. Each defendant might be found to have contributed to the success of the overall conspiracy, notwithstanding that he operates on only one level.

Moreover, no prejudice arose from the court's refusal to instruct on multiple conspiracies. The jury's special findings reflected its belief that Perez was involved only in the importation of heroin. All of the abundant evidence leading to the importation was admissible against Perez in its entirety. Because the

[5] Perez produced no evidence that he at any time withdrew from the conspiracy.

jury did not find Perez a participant in the remaining objectives of the single conspiracy as charged by the government, the jury had no difficulty in distinguishing between the different objectives of the conspiracy. Absent a showing of prejudice, Perez is entitled to no relief. *Kotteakos, supra,* 328 U.S. at 764.

3. Gonzalez' petition attacks for the first time the validity of the indictment on the ground that the original signed by the foreman of the grand jury and the United States Attorney did not contain the words "True Bill" (Gonzalez Pet. 3). Moreover, Gonzalez asserts that his trial counsel was ineffective in failing to raise this issue. Nothing in Rule 7(c), Fed. R. Crim. P., requires those words on an indictment as a precondition to its lawfulness. Accordingly, Gonzalez' trial counsel cannot be faulted for failing to challenge the sufficiency of the indictment prior to trial.

Additionally, there is no merit to Gonzalez' claim that the indictment was unlawfully amended when, at the court's direction, the copy sent to the jury omitted (1) the names of two defendants not on trial (and not mentioned in any manner in the evidence), (2) the aliases of all three petitioners and other defendants, and (3) two overt acts, involving other defendants, not proved at trial. This type of redacting, intended to protect the defendants from the jury's consideration of potentially harmful and unnecessary averments, has long been sanctioned and is wholly proper. *Salinger* v. *United States,* 272 U.S. 542, 548–549;

United States v. *Griffin*, 463 F. 2d 177, 178 (C.A. 10), certiorari denied, 409 U.S. 988; *United States* v. *Colasurdo*, 453 F. 2d 585, 590–591 (C.A. 2); *Thomas* v. *United States*, 398 F. 2d 531 (C.A. 5); *Vincent* v. *United States*, 337 F. 2d 891 (C.A. 8), certiorari denied, 380 U.S. 988; *Overstreet* v. *United States*, 321 F. 2d 459 (C.A. 5), certiorari denied, 376 U.S. 919.[6]

4. Petitioner Arroyo's "spy on the defense" allegation (Arroyo Pet. 5–9) is based upon the presence at some of Arroyo's defense strategy planning meetings of his close friend, co-defendant Louis Fragliossi. Fragliossi had been indicted on information provided by New York undercover agent Valentine, but unbeknownst to Valentine or the United States Attorney's Office, he was in fact an informant for Federal Bureau of Narcotics and Dangerous Drugs agent Leonard Vecchione. Immediately after the indictment was filed in December 1972, Vecchione and Fragliossi's attorney attempted to reach the United States Attorney's Office concerning the erroneous indicting of Fragliossi. In late January 1973, the eventual government trial counsel, Franklin Velie, assumed responsibility for the case. Within a week he began investigating Fragliossi's status, and determined that he should

[6] Petitioner Gonzalez relies upon a line of decisions following the rationale of *Ex parte Bain*, 121 U.S. 1. However, *Bain* was distinguished in *Salinger*, *supra*, 272 U.S. at 549: "In the case of *Ex parte Bain*, 121 U.S. 1, on which the accused relies, there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied."

meet personally with Fragliossi in Vecchione's presence to verify Fragliossi's representations (Tr. 718–720). Because of Fragliossi's reluctance to be seen in the vicinity of the United States Attorney's Office, the meeting was delayed until February 21, 1973. At the meeting, Velie determined preliminarily that Fragliossi may well have been indicted in error (Tr. 720–721). At the conclusion of the meeting, Velie told Fragliossi that he would continue his investigation of the situation, and that in the meantime Fragliossi should not meet or converse with other defendants (Tr. 721).

During the period between indictment and the meeting with Velie, Fragliossi had attended about a half-dozen meetings with Arroyo and counsel, at which time certain strategies were discussed. He did not discuss these meetings with Vecchione (Tr. 591). Even after the meeting with Velie, Fragliossi continued to attend some of Arroyo's meetings with counsel despite Velie's direction to the contrary.[7] The only information he disclosed to the government was Arroyo's interest in plea bargaining and the fact that a co-defendant, one Rodriguez, "had a contract out on Freddie Aviles" (Tr. 321). Neither Fragliossi nor Vecchione was in any way involved in the preparation or the presentation of the government's case against petitioners (Tr. 732).

The courts below properly ruled that the mere presence of Fragliossi at meetings between Arroyo and his

[7] Fragliossi's reason for accompanying Arroyo, apparently at the latter's invitation, to meetings with the attorneys was that "Mr. Arroyo didn't understand what was going on" (Tr. 588).

counsel, absent any showing that the substance of those meetings had been passed on to the prosecutors or that Arroyo had been prejudiced, did not entitle Arroyo to total immunity from prosecution. Arroyo Pet. App. A–10 to A–16; 494 F. 2d 1316, 1321–1323. Contrary to his contention, Arroyo was properly required to show either that his case was somehow prejudiced by his ignorance of Fragliossi's true status at the time they both met with Arroyo's counsel, or that the activity on the part of government officials was so intemperate in nature as to warrant the drastic supervisory remedy of setting defendant free. Where, as here, there was no use of tainted evidence or prejudice, and the behavior of government officials cannot be regarded as "conduct well below the line of acceptability," there is "no need to punish the prosecutor by freeing the defendant." *United States* v. *Rosner,* 485 F. 2d 1213, 1227 (C.A. 2); see *United States* v. *Rispo,* 460 F. 2d 965 (C.A. 3).

This Court implicitly rejected in *Black* v. *United States,* 385 U.S. 26, the contention that no prejudice need be shown once a violation of attorney-client confidences by a government informant is established. There, the unlawful monitoring of conversations between a defendant and his attorney was not bared until long after trial. This Court ordered a new trial to "permit the removal of any doubt as to Black's receiving a fair trial with full consideration being given * * *" to the new evidence of monitoring of attorney-client conversations. *Black, supra,* 385 U.S. at

29. The remedy was not, as Arroyo urges here, outright dismissal of the prosecution. See also *O'Brien* v. *United States,* 386 U.S. 345.[8] Here the circumstances of the intrusion on the attorney-client relation were fully explored by the trial court, which found no prejudice.

5. During the cross-examination of government witness Alfredo Aviles, he was asked whether he had caused an associate, Eddie Esquijarosa, to telephone Valentine while the latter was working undercover, pretend that he was Raphael Torres, and make statements falsely incriminating Benjamin Rodriguez. Aviles denied such conduct, testifying that he was the one who had identified Esquijarosa's voice when he heard the tape of the conversation between Valentine and the person representing himself as Torres, and had thereby given the government information tending to exculpate Rodriguez (Tr. 839–854).

The foundation for the questions regarding the suspected wrongful implication of Rodriguez was a pretrial statement made to Rodriguez' attorney by Aviles' wife, Isabel, who resided in Puerto Rico. At the end of the government's case, counsel for Gonzalez asked

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[8] Similarly, in *Caldwell* v. *United States*, 205 F. 2d 879 (C.A.D.C.) (cited by Arroyo, Pet. 11, 14), the court of appeals ordered a new trial upon a showing that a government agent had been privy to conversations between the defendant and his counsel. On re-trial, evidently without any evidence that might have been secured from this agent, the defendant was convicted and the conviction affirmed. *Caldwell* v. *United States*, 218 F. 2d 370 (C.A.D.C.), certiorari denied, 349 U.S. 930.

for a delay to produce Isabel in an effort to rebut Aviles' testimony. After criticizing the untimeliness of the request (Tr. 1206–1213), the court stated, "If all this woman is going to testify to is about Torres, Rodriguez and Esqui Jarossa [sic], save yourself the money [*i.e.*, air fare] because you have now made an offer of proof and I tell you that I don't regard that as admissible evidence" (Tr. 1214). The following morning counsel for Gonzalez reported that Isabel had been interviewed and was unable to testify "that Aviles framed * * * any of the * * * defendants [on trial] * * * and consequently, of course, there would be no point in producing her * * *" (Tr. 1217). Defense counsel's offer to rebut Aviles' statements on cross-examination regarding persons other than those on trial by the contradictory testimony of a defense witness was addressed to the sound discretion of the trial judge. The matter being a collateral one, he did not err in requiring counsel to accept the responses elicited from Aviles and in prohibiting extrinsic proof having a tendency to contradict Aviles. *Corpus* v. *Beto,* 469 F. 2d 953 (C.A. 5); *Tinker* v. *United States,* 417 F. 2d 542 (C.A. D.C.), certiorari denied, 396 U.S. 864; *United States* v. *Franzese,* 392 F. 2d 954 (C.A. 2), vacated on other grounds, 394 U.S. 310; see *United States* v. *Lambert,* 463 F. 2d 552 (C.A. 7); *Byrd* v. *United States,* 314 F. 2d 336 (C.A. 5), certiorari denied, 375 U.S. 816; 3 Wigmore, *Evidence,* §§ 1002–1003 (3d ed., 1940).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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